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SIR ALEXANDER COCKBURN.[1]

THE large measure of public attention which Sir Alexander Cockburn commanded during his lifetime probably led to an undue estimate of the permanent value of his judicial services.

[1] Alexander James Cockburn was born in 1802. His father represented an old and distinguished Scotch family, and his mother, from whom he inherited some of his most noticeable traits, was a Frenchwoman. He was educated at Cambridge, and called to the bar, at the Middle Temple, in 1829. He became Queen's counsel in 1841, and in 1843 won his first distinguished triumph in his successful defence of M'Naghten, who shot Sir Robt. Peel's private secretary. In 1847 he entered Parliament, where, in 1850, he took high rank as an orator by his speech in the Don Pacifico debate. The house of Don Pacifico, a British subject residing in Athens, had been wrecked by a mob in which Greek soldiers and gendarmes were conspicuous. Compensation having been refused, the British fleet bombarded the Piræus. Cockburn defended the government's course in a speech of remarkable eloquence. In a fine peroration, he asked the house to decide by its verdict "whether, as the Roman in days of old held himself free from indignity when he could say, 'I am a Roman citizen,' so also a British subject, in whatever land he may be, shall feel confident that the watchful eye and the strong arm of England will protect him against injustice and wrong." "Never in our time," says Mr. McCarthy in his History of Our Own Times, "has a reputation been more suddenly, completely, and deservedly made than Mr. Cockburn won by his brilliant display of ingenious argument and stirring words." He was promptly rewarded with the solicitor-generalship, and twelve months later became attorney general. In 1856 he succeeded Jervis as chief justice of the Common Pleas; three years later he became chief justice of the Queen's Bench, where he presided to the day of his death in 1880. He was a man of varied accomplishments, — a linguist, a musician, and a man of exceptional literary and social acquirements. His ardent temperament led him into frequent public controversies, the most prominent of which was that with Lord Penzance over the well known ecclesiastical case of Martin *v.* Mackonochie. He published an essay on

Along with gifts which readily attract popular admiration he seems to have had an eye for effect little short of dramatic, and his distinguished manner was calculated to impress the senses even when his judgment failed to satisfy the understanding. Still, even a cursory examination of his work reveals a man of singular ability. Combining in an eminent degree the logical and imaginative qualities of mind, he was not only a consummate advocate but also a distinguished judge. Possibly there have been more eminent advocates; certainly there have been more profound judges; but rarely a man who united to such an extent the attributes of each — who made so many great arguments [1] and displayed in so

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Nationality, and a series of articles on the History of the Chase and on the Letters of Junius.

[1] Three fully reported cases of general interest furnish a basis for estimating Cockburn's powers as an advocate: the trial of Daniel M'Naghten for the murder of Sir Robert Peel's private secretary, the trial of William Palmer for the murder of J. D. Cook, and the Hopwood will case.

The M'Naghten case illustrates his ability in defence. M'Naghten, while laboring under an insane delusion that Sir Robert Peel had injured him, and mistaking Drummond for Peel, shot Drummond. In the face of great difficulties Cockburn successfully put forward the defence of partial insanity. This doctrine had been expressly repudiated by Hale, and the time-honored statement of the law was that a man must be judged by his conduct taken as a whole. Cockburn was very cautious in his argument. He ostensibly pressed the familiar doctrine by skilfully chosen extracts from Erskine's defence of Hadfield; but his real claim was that the prisoner was a monomaniac, and not, at the time the act was committed, responsible for what he did. It is to be observed that in examining his medical witnesses, although he put the case as one of partial unsoundness, he took care also to elicit the opinion that the prisoner did not know right from wrong. The judges allowed the defence to pass uncriticized, but in their remarks to the jury they simply put the case upon the usual question, whether the prisoner at the time the act was committed was sensible of the difference between right and wrong. 4 St. Tr. (N. S.) 847. Cockburn's argument in this case is probably the best specimen we have of his eloquence. It is interesting to compare it with the similar argument by Erskine in defense of Hadfield.

In the Palmer case he showed his skill as a prosecutor. The case for the crown was that Palmer first practiced upon Cook with antimony and finally killed him with strychnine. The difficulty was that tetanus, the immediate cause of Cook's death, may proceed from many causes; and no strychnine was found in the body of the deceased. The points at issue were, therefore, (1) were the symptoms in Cook's case such as could only be produced by strychnine, or could they have arisen from other diseases, and especially from one of the forms of ordinary tetanus? (2) if strychnine had been given, could it not have been discovered by chemical analysis? The second question was, however, relative not so much to the guilt or innocence of the prisoner as to the ability of the chemist who made the analysis. In the marked conflict between the testimony of the various medical witnesses, the skill with which Cockburn cross-examined the witnesses for the defence — compelling them to admit that, whatever their own favorite opinion, they were unable to distinguish Cook's symptoms from those of poisoning by strychnine — was masterly. Cockburn had made the most exhaustive study of the case, even submitting himself to examination by medical experts. The result was that evidence could not be more condensed, more complete, more closely directed to the

many notable judgments such grasp of the theory and application of law.

Like Erskine and Brougham, with whom alone he shares the highest honors of forensic advocacy at the English bar, his mind was more capacious than powerful, clear rather than profound. Although his ability to deal with complicated facts — to present them in harmonious order and reason powerfully upon them — was of a very high order, his arguments fall short of the simple logical structure which characterizes Erskine's art; and his methods are in direct contrast to Brougham's energy and force. Thus, in the

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very point at issue. Cockburn's closing argument is a model of propriety as well as irresistible force. The prisoner expressed, in racing parlance, the accepted view of his conviction when he said that "it was the riding that did it."

The facts in the Hopwood will case were these: Mr Hopwood, a gentleman of large property, had, during the period of decaying mental powers preceding his death, executed a will which revoked a former will and disinherited his eldest son, who had been the beneficiary therein. The case alleged by the brothers and sisters, who would take under the second will, was that Capt. Hopwood, the eldest son, had alienated his father's affections during the last years of the latter's life by his unfeeling and overbearing insistence on assuming the management of the property, when, in fact, the old gentleman was perfectly competent to retain it. Capt. Hopwood claimed that he had simply done his duty; that his father was manifestly imbecile and incapable of transacting business; that his brothers and sisters had for their own purposes misrepresented his interference to his father, had brought about a quarrel between them, and had finally procured the execution of the second will by undue influence. The case obviously turned to a large extent upon the capacity of old Mr. Hopwood, and furnished a fine opportunity for the display of Cockburn's powers. As counsel for Capt. Hopwood, he drew an eloquent picture of the unnatural conspiracy amongst Capt. Hopwood's brothers and sisters to rob him of his rights and deprive him of his father's affections — of the son who "finds himself in danger of being despoiled of that inheritance which was the object of his rightful and legitimate hopes, and this, not by any of these accidental circumstances to which, in the mutability of human things, all men are subject, but by the machinations and hostility of those at whose hands, from the ties of blood and natural affection and from the recollection of infancy and childhood passed together, he might have expected affection, or, at all events, mercy." He referred to Mr. Hopwood as "a poor old man, worn down by years, enfeebled by infirmity and disease, gradually becoming incapable of thought or reflection, or of thought that required judgment and reasoning power, having, if he had any glimmering of intelligence remaining, only enough, and that but at times, to go through the commonest matters of every day life — having, if he had any will at all, just so much as enabled him to be influenced by those around him and to be made the creature of their desires — when, I say, with such a mind, this poor gentleman was worked upon until he made a disposition which was not his, but that of those around him, . . . should I do them wrong if I applied to them the words of the satirist, who has described in graphic language the mode in which the mind of a man may be worked upon to dispose of his property to the prejudice of those who have claims upon his natural affections, when he says:

> "They still recall the past offence;
> Improve his heady rage with treacherous skill,
> And mould his passions till they make his will.'"

The verdict was in Capt. Hopwood's favor.

Hopwood will case, in speaking of a conflict of testimony — a point which Brougham would have carried by assault — Cockburn said :

"They do not give the same version of that discussion. I have no doubt that each of them came here to give what he believed to be a most faithful representation. I know what a treacherous thing man's memory is, and more especially with regard to words. The great poet describes words as winged, and so in truth they are. They are borne away upon the breath that utters them and are lost; and when the memory tries to reproduce them the imagination mixes itself in the operation, colors them and gives them a character and complexion which is not the truth; and yet to the mind which repeats them they assume the semblance of reality."

In comparison with the simplicity of Erskine's diction, Cockburn's eloquence seems picturesque; his high breeding, his great social gifts, his varied scholarship and numerous accomplishments imparted a peculiar flavor to his mental operations. In judgment he surpassed both Erskine and Brougham, and the acute sensibility which was his most prominent characteristic manifested itself in a range of imagination to which neither of his rivals could make any pretension. The way in which his imagination colored his conceptions may be illustrated by his statement, in defence of M'Naghten, of the fact that the law absolves the insane from responsibility :

"There is no doubt, gentlemen, that, according to the law of England, insanity absolves a man from responsibility and from the legal consequences which would otherwise attach to the violation of the law. And in this respect, indeed, the law of England goes no further than the law of every other civilized community on the face of the earth. It goes no further than what reason strictly prescribes; and if it be not too presumptuous to scan the judgments of a higher tribunal, it may not be too much to believe and hope that Providence, when in its inscrutable wisdom and its unfathomable councils it thinks fit to lay upon a human being the heaviest and most appalling of all calamities to which, in this world of trial and suffering, human nature can be subjected, — the deprivation of that reason, which is man's only light and guide in the intricate and slippery paths of life, — will absolve him from his responsibility to the laws of God as well as to those of man. The law, then, takes cognizance of that disease which obscures the intellect and poisons the very sources of thought and feeling in the human being — which deprives man of reason, and converts him into the similitude of the lower animal — which bears down all the motives which usually stand as barriers around his conduct, and bring him within the operation of the Divine and the human law — leaving the unhappy sufferer to the wild impulses which his frantic

imagination engenders, and which urge him on with ungovernable fury to the commission of acts which his better reason, when yet unclouded, would have abhorred. The law, therefore, holds that a human being in such a state is exempt from legal responsibility and legal punishment; to hold otherwise would be to violate every principle of justice and humanity."

Another passage from the same argument will serve to indicate the robust reasoning which underlies his imaginative expression. By way of introduction to his presentation of the doctrine of partial insanity, he said:

"I think it will be quite impossible for any person who brings a sound judgment to bear upon this question, when viewed with the aid of the light which science has thrown upon it, to come to the opinion that the ancient maxims which, in times gone by, have been laid down for our guidance, can be taken still to obtain in the full force of the terms in which they were laid down. It must not be forgotten that the knowledge of this disease in all its various forms is a matter of very recent growth. I feel that I may appeal to the many medical gentlemen I see around me, whether the knowledge and pathology of this disease has not within a few recent years first acquired the character of a science? It is known to all that it is but as yesterday that the system of treatment which in past ages — to the eternal disgrace of these ages — was pursued toward those whom it had pleased Heaven to visit with the heaviest of all human afflictions, and who were therefore best entitled to the tenderest care and most watchful kindness of their Christian brethren, — it is but as yesterday, I say, that that system has been changed for another which, thank God, exists to our honor and to the comfort and better prospect of recovery of the unfortunate diseased in mind. It is but as yesterday that darkness and solitude — cut off from the rest of mankind like the lepers of old — the dismal cell, the bed of straw, the iron chain and the inhuman scourge, were the fearful lot of those who were best entitled to human pity and to human sympathy, as being the victims of the most dreadful of all mortal calamities. This state of things has passed, or is passing, fast away. But in former times when it did exist, you will not wonder that these unhappy persons were looked upon with a different eye. Thank God, at last — though but at last — humanity and wisdom have penetrated, hand in hand, into the dreary abodes of these miserable beings, and whilst the one has poured the balm of consolation into the bosoms of the afflicted, the other has held the light of science over our hitherto imperfect knowledge of this dire disaster, has ascertained its varying character, and marked its shadowy boundaries, and taught us how, in gentleness and mercy, best to minister to the relief and restoration of the sufferer. You can easily understand, gentlemen, that when it was the practice to separate these unhappy beings from the rest of mankind, and to subject them

to this cruel treatment, the person whose reason was but partially obscured would ultimately, and perhaps speedily, in most cases, be converted into a raving madman. You can easily understand, too, that when thus immured and shut up from the inspection of public inquiry, neglected, abandoned, overlooked, — all the peculiar forms and characteristics and changes of this malady were lost sight of and unknown, and kept from the knowledge of mankind at large, and therefore how difficult it was to judge correctly concerning it. Thus I am enabled to understand how it was that crude maxims and singular propositions, founded upon the hitherto partial knowledge of this disease, have been put forward and received as authority, although utterly inapplicable to many of the cases arising under the varied forms of insanity. Science is ever on the advance; and, no doubt, science of this kind, like all other, is in advance of the generality of mankind. It is a matter of science altogether; and we, who have the ordinary duties of our several stations and the business of our respective avocations to occupy our full attention, cannot be so well informed upon it as those who have scientifically pursued the study and the treatment of the disease. I think, then, we shall be fully justified in turning to the doctrines of matured science rather than to the maxims put forth in times when neither knowledge, nor philanthropy, nor philosophy, nor common justice had their full operations in discussions of this nature."

By no means the least conspicuous element of Cockburn's advocacy is the high ideal which animates it. He expressed, with characteristic eloquence, his own conception of his duty and responsibility as an advocate in a speech which he delivered at a banquet given by the English bar to the distinguished French advocate, M. Berryer. With evident reference to the statement made on the same occasion by Lord Brougham that "the first quality of an advocate is to reckon everything subordinate to the interests of his client," Cockburn said:

"Much as I admire the great abilities of M. Berryer, to my mind his crowning virtue — as it ought to be that of every advocate — is that he has throughout his career conducted his cases with untarnished honor. The arms which an advocate wields he ought to use as a warrior, not as an assassin. He ought to uphold the interests of his clients *per fas* and not *per nefas*. He ought to know how to reconcile the interests of his client with the eternal interests of truth and justice."

Such was the range of Cockburn's imagination that, had it been balanced by equal strength in reasoning faculty, his mental equipment would have been unsurpassed. But the acute sensibility which characterized his temperament was itself of no inconsiderable aid in the successful discharge of his judicial functions. The law is not merely a system of rules; nor is its administration simply

the application of these rules by rigid logical deduction. Since it is designed to serve the needs of mankind, its efficient administration requires a clear and just appreciation of the facts to which it is to be applied. The successful investigation of these facts is therefore an essential preliminary to, and a most important element of, a just determination. A learned lawyer who is wanting in imagination and knowledge of the world may not only fail to discover the facts, but may also misapprehend the bearing upon them of the rule of which he has no full and pregnant, but only a dry and technical, knowledge. Of course the measure of value of such qualities depends upon the extent to which they coexist with a logical basis in the understanding; but in the perfect coördination of these opposite qualities reside the elements of the highest judicial capacity. In Cockburn's equipment imaginative qualities certainly predominated. His mind was perhaps too quick and susceptible to admit of the tenacity of grasp essential to the highest excellence in the formal exposition of legal doctrines. Hence he was greatest in dealing with facts. At *nisi prius* he displayed his best judicial powers. There his grace of manner, his knowledge of the world, his refined and eloquent diction and his lucid and orderly intellect, combined to make him an ideal judge. His most conspicuous effort in this sphere was his charge in the memorable Tichborne case, which occupied eighteen days in delivery.[1] In this case his view of the duty of a trial judge is distinctly set forth:

"In my opinion a judge does not discharge his duty who contents himself with being a mere recipient of evidence, which he is afterwards to reproduce to the jury without pointing out the facts and inferences to which they naturally and legitimately give rise. It is the business of the judge so to adjust the scales of the balance that they shall hang evenly. But it is his duty to see that the facts as they arise are placed in the one scale or the other according as they belong to one or the other. It is his business to take care that the inferences which properly arise from the facts are submitted to the consideration of the jury, with the happy consciousness that if we go wrong there is the judgment of twelve men having experience in the every day concerns of life to set right anything in respect of which he may have erred. . . . In the conviction of the innocent, and also in the escape of the guilty, lies, as the old saying is, the condemnation of the judge."

[1] Besides the Tichborne case, he presided, among other *causes célèbres*, at the trial of the Matlock will case; the Wainright murder case, a leading case of circumstantial evidence; the convent case of Saurin *v.* Starr, an action by a Sister of Mercy against her mother superior for assault, and Reg. *v.* Gurney, a prominent case of fraud and conspiracy.

The skill with which he laid bare the actual issues in a case, and particularly the manner in which he eliminated all elements of passion and prejudice, displays the hand of a master.[1] Still, it

[1] In the case of Saurin *v.* Starr, for instance, where the sectarian features of the case had been largely utilized for declamatory purposes by counsel, Cockburn said:

"Gentlemen, I congratulate you on having arrived at the conclusion of this 'monster cause' arising out of the miserable squabbles of a convent, which might better have been disposed of, and ought to have been disposed of, by the visitatorial jurisdiction of the bishop according to the constitution of the order. But the cause is here; and however little it may interest us, no doubt it is of deep and vital importance to the parties concerned, and we must endeavor to ascertain on which side truth and justice lie. There is no doubt that in consequence of the revelations of convent life which the trial has elicited, it has acquired a factitious interest and importance which, if it had related to disputes arising in any other religious society, it never would have possessed. We must take care that neither party derives any advantage from the religious element mixed up in the case. The plaintiff has what the defendants may deem a great advantage to her and a great disadvantage to them; that they are here upon their trial before a Protestant jury; and I must warn you against allowing any religious prepossessions or prejudices to operate to the advantage of one party or to the disadvantage of the other. I believe I am addressing twelve gentlemen who belong to our great Protestant community, and as such, perhaps also as thinking men, you may think the convent life is an object of dislike and of suspicion. But no such consideration must for a single moment influence your minds. You may think that withdrawing women from the sphere for which by nature they were destined, — that of being wives and mothers, and thus forming and cementing ties on which, in the main, human happiness must rest, — that this is an attempt to obliterate human instincts, to chill human affections, or, at all events, to repress them within the narrow bounds and limits of an artificial and unnatural life, contrary to the laws of nature and the ordinances of God. You may also think that, though man's object throughout his passage here should be to look forward to eternity and prepare for it, yet that his passage to heaven lies through the world in which we are placed. Man's service to God is never well and entirely fulfilled except when he discharges those duties, domestic and social, which we are sent here to discharge; and you may think, as the solicitor-general so eloquently expressed, that the more generous emotions and finer sentiments of the human soul, and even the religious sentiment itself, must lose rather than gain by this life of monotonous observance of trivial rules — these petty and pitiful observances which we have heard described in this case. But we have nothing to do with these considerations. This is not a case in which Protestant parents complained that their daughter had been inveigled and subjected to restraint when she wished to leave it, or has been ill-treated because her better judgment revolted at the practices she has been called upon to perform; but in the present case the person who now comes forward is one whose parents had sent a third daughter to conventual life; and we are dealing with one who does not complain of having been kept in a convent, but of being turned out of a convent — of one who, in the words of our great poet, desired still to

> 'Endure the livery of a nun:
> For aye to be in shady cloister mew'd,
> To live a barren sister all her life.'

"It would be, therefore, a great error to allow the religious feeling to interfere in this case; and we ought to try it as though we were all right-minded Catholics — members of the Roman Catholic Church, accepting as common data the system which is common to both parties, that conventual system which gives unlimited power to the superior and imposes unqualified subjection upon the subordinate."

Most of the stock arguments of criminal trials were characterized by him in his charge in the Tichborne trial. With respect to reasonable doubt he said:

must be admitted that his methods sometimes justified complaint. He was apt to form his opinion with too rapid judgment; and although he brought to the discharge of his judicial duties the very highest sense of his responsibilities, his opinions were often put forward in such a manner as to occasion the impression that the scales of justice had not been held with that absolute impartiality which is essential to the satisfactory administration of the law.[1]

"You have been asked, gentlemen, to give the defendant the benefit of any doubts you may entertain. Most assuredly it is your duty to do so. It is the business of the prosecution to bring home guilt to the accused to the satisfaction of the jury. But the doubt of which the accused is entitled to the benefit must be the doubt that a rational, that a sensible man may fairly entertain, not the doubt of a vacillating mind that has not the moral courage to decide, but shelters itself in a vain and idle scepticism. . . . I should be the last man to suggest to any individual member of the jury that if he entertains conscientious, fixed convictions, although he may stand alone against his eleven fellow jurors, he should give up the profound and unalterable convictions of his own mind. . . . But then we must recollect that he has a duty to perform, and that it is this. He is bound to give the case every possible consideration before he finally determines upon the course he will pursue, and if a man finds himself differing from the rest of his fellows with whom he is associated in the great and solemn function of the administration of justice, he should start with the fair presumption that the one individual is more likely to be wrong than the eleven from whom he differs. He should bear in mind that the great purpose of trial by jury is to obtain unanimity and put an end to further litigation; he should address himself, and in all diffidence in his own judgment, to the task he has to perform, and carefully consider all the reasons and arguments which the rest of the body are able to put forward for the judgment they are ready to pronounce, and he should let no self-conceit, no notion of being superior to the rest in intelligence, no vain presumption of superiority on his part, stand in the way. . . . That is the duty which the juryman owes to the administration of justice and the opinion of his fellows, and therefore I must protest against the attempt to encourage a single juryman, or one or two among a body of twelve, to stand out resolutely, positively, and with fixed determination and purpose, against the judgment and opinion of the majority."

With respect to the argument that public opinion was with the accused, he said:

"There is but one course to follow in the discharge of great public duties. No man should be insensible to public opinion who has to discharge a public trust. . . . But there is a consideration far higher than that. It is the satisfaction of your own internal sense of duty, the satisfaction of your own conscience, the knowledge that you are following the promptings of that still, small voice which never, if we listen honestly to its dictates, misleads or deceives — that still, small voice whose approval upholds us even though men should condemn us, and whose approval is far more precious than the honor or applause we may derive, no matter from what source. . . . Listen to that, gentlemen, listen to that; do right, and care not for anything that may be thought or said or done without these walls. In this, the sacred temple of justice, such considerations as those to which I have referred ought to have and can have no place. You and I have only one thing to consider; that is, the duty we have to discharge before God and man according to the only manner we should desire to discharge it, — honestly, truly, and fearlessly, without regard to any consequences except the desire that this duty should be properly and entirely fulfilled."

His charge in Reg. *v.* Gurney, 11 Cox Cr. Cas. 437, is an example of the manner in which he occasionally administered advice to the public.

[1] His charge in the Tichborne case is perhaps the strongest example of this tendency. But his conduct of the trial was conspicuously patient; and whatever exception the de-

It was a remark of Lord Westbury's, characterized by his usual keenness in disparagement, that Cockburn acquired his legal knowledge by sitting on the bench with Justice Blackburn. Beyond doubt Blackburn's vigorous intellect was the ruling power in the Court of Queen's Bench throughout Cockburn's service; and it may be imagined that a natural lawyer like Blackburn, who delighted in solving legal problems, and whose enjoyment was over as soon as the difficulty was solved, would readily concede to the ready wit and fluent tongue of his chief the opportunity of expressing in graceful and epigrammatic English the results of his acumen. But with his great natural acquisitive powers and assiduous application Cockburn certainly acquired a firm grasp of the fundamental principles of the law.[1] If the scope and activity of his

fendant might have taken to the summing up of the evidence he certainly had no just cause to complain of the dignified rebuke administered to his counsel. "When witnesses are misrepresented," said Cockburn in his charge; "when evidence is misstated; when facts are perverted — and that not for the purpose of argument in the cause, but in order to lay the foundation of foul imputations and unjust accusations against parties and witnesses; when one unceasing torrent of invective and foul slander is sent forth wherewith to blacken the character of men whose reputations have been hitherto without reproach, — then it is impossible for judges to remain silent. . . . Therefore it was that we felt it to be our duty to interpose and check the torrent of undisguised and unlimited abuse in which the learned counsel for the defendant thought proper to indulge. And in what way, gentlemen, were our remonstrances met? . . . We were met by contumely and disrespect, by insult, by covert allusions to Scroggs and Jeffries, — judges of infamous repute, — as if, in days when such a spirit as theirs animated the administration of justice, the learned counsel would not have been quickly laid by the heels and put aside. We were met by suggestions that we were interfering with the liberties and privileges of the bar. . . . We know full well that the freedom of the bar is essential to the administration of justice. We know that it would be an ill day indeed for the country if the freedom of the bar were ever interfered with. . . . We did not interfere with the privileges of the bar; we interfered to check the license of unscrupulous abuse, to restrain that which, instead of being fair, legitimate argument, amounted to misstatement, misrepresentation, and slander. The bar of England — as high-minded, noble-spirited, and generous a body of men as are to be found in the world — have never claimed slander as one of their privileges or considered its restraint as an invasion of their rights."

[1] It would be a great mistake to infer that he lacked courage in his convictions. In Dawkins *v.* Paulet, 5 Q. B. 94, he dissented not only from the conclusion reached by his associates, but also from Mr. Justice Willes' ruling in 4 F. & F. 806, and from Lord Mansfield's reasoning in Sutton *v.* Johnstone. See also his vigorous dissent in Collen *v.* Wright, 8 El. & Bl. 647, from the conclusion of his associates that a party making a contract as agent in the name of a principal impliedly contracts that he has authority from his alleged principal to make the contract, and that if he has in fact no authority he is personally liable. "My view," said Cockburn, "is that this implied contract which we are called upon to establish in this case, is a thing unknown to our law; that we are dealing not with a mere mode whereby an acknowledged liability may be enforced, but, a supposed liability having turned out to be unfounded in law, we are now creating a new species of liability on a new contract, now for the first time to be implied, which, if the party now to be charged had been required expressly to give, he would probably have refused."

intelligence and the variety of his pursuits to some extent impaired the fulness and accuracy of his acquaintance with its subordinate rules, his imagination never led him, on the other hand, aside from the path of the law into a fanciful equity. He was conservative to a fault; but his learning was his servant, not his master, and he was fully alive to the necessity of keeping rules of law in touch with the affairs of men.[1] The liberal mind which had been formed by cultivation, travel, and wide intercourse with all classes of men, he brought to bear in the performance of his judicial functions. Servile technicality found no more outspoken opponent. If his temperament led him too often in his opinions to argue rather than expound,[2] his keen insight and worldly knowledge frequently saved him from pitfalls into which the less worldly would have fallen.[3]

[1] In the course of his elaborate opinion for the Exchequer Chamber in Goodwin *v.* Robarts, 10 Ex. 337, with respect to the negotiability of foreign scrip issued by an agent in England, he said: "It [counsel's argument] is founded on the view that the law merchant thus referred to is fixed and stereotyped, and incapable of being expanded and enlarged so as to meet the wants and requirements of trade in the varying circumstances of commerce. It is true that the law merchant is sometimes spoken of as a fixed body of law, forming part of the common law, and, as it were, coeval with it. But as a matter of legal history this view is altogether incorrect. The law merchant thus spoken of with reference to bills of exchange and other negotiable securities, though forming part of the *lex mercatoria*, is of comparatively recent origin. It is neither more nor less than the usages of merchants and traders in the different departments of trade ratified by the decisions of courts of law, which, upon such usages having been proved before them, have adopted them as settled law, with a view to the interests of trade and the public convenience. . . . Usage adopted by the courts having been thus the origin of the whole law merchant as to negotiable securities, what is there to prevent our acting upon the principle acted upon by our predecessors and followed in the precedents they have left us? Why is it to be said that a new usage which has sprung up under altered circumstances is to be less admissible than the usage of past times? Why is the door to be now shut to the admission and adoption of usage in a matter altogether of cognate character, as though the law had been finally stereotyped and settled by some positive and peremptory enactment? . . . The universality of a usage adopted between buyers and sellers is conclusive proof of its being in accordance with public convenience; and there can be no doubt that by holding this species of security to be incapable of being transferred by delivery, and as requiring some more cumbrous method of assignment, we should materially hamper the transactions of the money market with respect to it and cause great public inconvenience." See, also, his opinion in Frost *v.* Knight, 7 Ex. 111, where the doctrine of Hochster *v.* De la Tour, 2 E. & B. 678, was applied to a contract in which performance depended on a contingency.

[2] Fitzjohn *v.* Mackinder, 30 L. J. C. P. 257, may be cited as an illustration. But the habit appears in most of his opinions, as, for instance, in Banks *v.* Goodfellow, 5 Q. B. 549, where, in expounding the law with reference to the right of testamentary disposition by persons whose minds are diseased, he adds, by way of argument, "It cannot be the object of the legislator to aggravate an affliction in itself so great by the deprivation of a right the value of which is so universally felt and acknowledged." On the other hand, his skill in this respect is displayed to advantage in cases turning mainly on questions of fact, like Jackson *v.* Met. R. R. Co., 2 C. P. D. 125.

[3] See his interesting opinion in Robinson *v.* Robinson, 1 Swab. & Tr. 392, a divorce case in which was sought to prove a wife's criminality by admissions in her diary.

Cockburn was at his best in the exposition of those branches of the law which are most closely based upon human life and conduct. But, as a whole, his influence upon the law has probably been felt more in the impulse and direction which he gave to certain topics than in his direct contribution to its formal contents. One important doctrine is, however, directly attributable to him — the doctrine with respect to partial insanity. Cockburn's successful defence of M'Naghten in 1843, on the ground of partial insanity, provoked much discussion.[1] Prior to that time the law had followed the prevailing medical doctrine, which, regarding insanity as a mental state resulting from disease, looked at the mind as a whole, and accordingly considered unsoundness in any one part or faculty as likely to render the entire mind unsound. The theory of partial insanity originated with a school of French physicians, some seventy years ago, and was named monomania by Esquirol, one of their number. Cockburn was thoroughly familiar with the French language and literature, and had no doubt studied the French theory, although he made no reference to it as such in his argument. He did, however, distinctly call M'Naghten a monomaniac. Upon the acquittal of M'Naghten, Lord Brougham, who was strongly opposed to the new theory, instituted an inquiry in the House of Lords, in pursuance of which the judges were called upon to answer certain questions formulated by the House, with a view to determining what the law really was. The judges showed considerable hesitation in dealing with the abstract proposition, but finally answered in such a way as to sanction the new doctrine as advocated by Cockburn.[2] Brougham thereupon took advantage of the occasion afforded by the testamentary case of Waring *v.* Waring[3] (although this was a case of general unsoundness) to restate the old doctrine and to formulate his objections to the new.[4] But

[1] The tenor of public opinion appears in some lines of the poet Campbell, printed in the Times:

"The Insane —
They 're a privileged class, whom no statute controls,
And their murderous charter exists in their souls."

[2] The doctrine has received further development by a series of American cases, of which Parsons *v.* The State, 81 Ala. 577, is an example.

[3] 6 Moo. P. C. 341.

[4] A brief quotation will indicate Brougham's standpoint: "We must keep always in view that which the inaccuracy of ordinary language inclines us to forget, that the mind is one and indivisible, that when we speak of its different powers or faculties, as memory, imagination, consciousness, we speak metaphorically, likening the mind to the body, as if it had members or compartments, whereas, in all accuracy of speech, we mean to speak of the mind acting variously, that is, remembering, fancying, reflecting, the same mind in all the operations being the agent. We therefore cannot, in any cor-

Brougham's conclusions were soon afterwards expressly repudiated, and the doctrine of partial insanity applied by Cockburn to testamentary cases in terms which have since been accepted as established law, in the leading case of Banks *v.* Goodfellow.[1] This is beyond doubt one of Cockburn's most important judicial efforts. It appeared that the testator in this case had once been confined as a lunatic, and remained subject to delusions that he was personally molested by a man who had long been dead, and that he was pursued by evil spirits whom he believed to be visibly present. Cockburn's reasoning will sufficiently appear from the following quotation :

"We do not think it necessary to consider the position assumed in Waring *v.* Waring, that the mind is one and indivisible, or to discuss the subject as matter of metaphysical or psychological inquiry. It is not given to man to fathom the mystery of the human intelligence, or to ascertain the constitution of our sentient and intellectual being. But whatever may be its essence, every one must be conscious that the faculties and functions of the mind are various and distinct, as are the powers and functions of our physical organization. The senses, the instincts, the affections, the passions, the moral qualities, the will, perception, thought, reason, imagination, memory, are so many distinct faculties or functions of the mind. The pathology of mental disease and the experience of insanity in its various forms teach us that while, on the one hand, all the faculties, moral and intellectual, may be involved in one common ruin, as in the case of the raving maniac, in other instances one or more only of these faculties or functions may be disordered, while the rest are left unimpaired and undisturbed, — that while the mind may be overpowered by delusions which utterly demoralize it and unfit it for the perception of the true nature of surrounding things, or for the discharge of the common obligations of life, there often are, on the other hand, delusions which, though the offspring of mental disease, and so far consti-

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rectness of language, speak of general or partial insanity; but we may most accurately speak of the mind exerting itself in consciousness without cloud or imperfection, but being morbid when it fancies; and so its owner may have a diseased imagination or the imagination may not be diseased, and yet the memory may be impaired, and its owner be said to have lost his memory. In these cases we do not mean that the mind has one faculty, as consciousness, sound; while another, as memory or imagination, is diseased; but that the mind is sound when reflecting on its own operations, and diseased when exercising the combination termed imagining or casting the retrospect, called recollecting." Lord Penzance followed this doctrine in Smith *v.* Tebbitt; and subsequently in Hancock *v.* Peaty he applied the same principle to matrimonial capacity. The bearing of this doctrine upon the French theory of *manie sans délire*, or "moral insanity," as it has been called, is obvious. If the mind is one and indivisible, no court or jury can determine the extent of the derangement caused by even a slight attack of insanity.

[1] 5 Q. B. 549.

tuting insanity, yet leave the individual in all other respects rational and capable of transacting the ordinary affairs and fulfilling the duties and obligations incidental to the various relations of life. No doubt when delusions exist which have no foundation in reality, and spring only from a diseased and morbid condition of the mind, to that extent the mind must necessarily be taken to be unsound; just as the body, if any of its parts or functions is affected by local disease, may be said to be unsound, though all its other members may be healthy, and their powers or functions unimpaired. . . . It is obvious that to the due exercise of a power [*i. e.* testamentary disposition] thus involving moral responsibility, the possession of the intellectual and moral faculties common to our nature should be insisted on as an indispensable condition. It is essential to the exercise of such a power that a testator shall understand the nature of the act and its effects; shall understand the extent of the property of which he is disposing, shall be able to comprehend and appreciate the claims to which he ought to give effect, and, with a view to the latter object, that no disorder of the mind shall poison his affections, pervert his sense of right, or prevent the exercise of his natural faculties, — that no insane delusion shall influence his will in disposing of his property, and thus bring about a disposition of it which, if the mind had been sound, would not have been made. . . . If it be conceded, as we think it must be, that the only legitimate or rational ground for denying testamentary capacity to persons of unsound mind is the inability to take into account and give due effect to the considerations which ought to be present to the mind of a testator in making his will, and to influence his decision as to the disposal of his property, it follows that a degree or form of unsoundness which neither disturbs the exercise of the faculties necessary for such an act, nor is capable of influencing the result, ought not to take away the power of making a will or place a person so circumstanced in a less advantageous position than others with regard to this right."[1]

On the law of libel — particularly with respect to the public press — Cockburn unquestionably made considerable impression. The meaning of the reservation in favor of privileged publications had been up to his time vaguely understood in many of its applications. In the leading case of Wason *v.* Walter,[2] he decided that a full and faithful report in a newspaper of proceedings in Parliament, although defamatory, is not actionable — a point upon which there had been no authority.[3] He established the privilege on

[1] This is now the accepted doctrine in England. Smee *v.* Smee, 5 P. D. 84; Boughton *v.* Knight, 42 L. J. P. 25. Capacity, like responsibility, is a question of fact. Technically, however, the question is still open to the House of Lords, which is bound neither by the individual nor by the collective opinion of the judges of the High Court.

[2] 4 Q. B. 73.

[3] In Dawkins *v.* Paulet, 5 Q. B. 94, where the majority of the court held in favor of the

its true foundation when he said that the public is privileged on the same principle as the proceedings of courts of justice, *i. e.* the advantage of publicity to the community at large outweighs any private injury that may be done.[1] He also gave a strong impulse to the now prevalent rule respecting the limits of public criticism. His general principle was perfect freedom of discussion of public men, stopping short of attacks on private character and reckless imputation of motives. In the case of Campbell *v.* Spottiswood,[2] he established the doctrine that when a writer in a newspaper or elsewhere, in comment on public matters, makes imputations on the character of individuals which are false and libellous, as being beyond the limits of fair criticism, it is no defence that he believed them to be true.

"It is said that it is for the interests of society that the public conduct of men should be criticised without any other limits than that the writer should have an honest belief that what he writes is true. But it seems to me that the public have an equal interest in the maintenance of the public character of public men; and public affairs could not be conducted by men of honor with a view to the welfare of the country if we were to sanction attacks upon them destructive of their honor and character and made without any foundation. I think the fair position in which the law may be settled is this: that where the public conduct of a public man is open to animadversion, and the writer who is commenting upon it makes imputations on his motives which arise fairly and legitimately out of his conduct, so that the jury shall say that the criticism

absolute privilege of communications made by a military officer to his chief, Cockburn dissented in a strong opinion. He took the ground that it never could be the duty of an officer falsely, maliciously, and without probable cause, to libel his fellow officer; that courts of common law have jurisdiction over all wilful and unjust abuse of military authority, and that it would not in any way be destructive of military discipline to submit questions of malicious oppression to the opinion of a jury. There was no appeal in this case. In the subsequent case of Dawkins *v.* Lord Rokeby, 7 H. L. 744, in which the absolute privilege was sustained by the House of Lords, the issue turned entirely on the fact that the defendant officer had been a witness. The point is therefore still open to the highest court.

[1] "Our law of libel has in many respects only gradually developed itself into anything like a satisfactory and settled form. The full liberty of public writers to comment on the conduct and motives of public men has only in very recent times been recognized. Comments on government, on ministers and officers of state, on members of both houses of Parliament, on judges and other public functionaries, are now made every day which half a century ago would have been the subject of actions or *ex officio* informations, and would have brought down fine and imprisonment on publishers and authors. Yet who can doubt that the public are gainers by the change, and that though injustice may often be done, and that though public men may often have to smart under the keen sense of wrong inflicted by hostile criticism, the nation profits by public opinion being thus freely brought to bear on the discharge of public duties."

[2] 3 B. & S. 769.

was not only honest but also well founded, an action is not maintainable. But it is not because a public writer fancies that the conduct of a public man is open to the suspicion of dishonesty, he is therefore justified in assailing his character as dishonest."

His elaborate charge in Hunter *v.* Sharpe,[1] may be regarded as supplementary to the doctrine formulated in Campbell *v.* Spottiswood,[2] some expressions of which were thought to imply that public writers were without protection as to statements of motive.[3]

A comparison of the respective statements made by Blackburn and Cockburn, in Campbell *v.* Spottiswood, of the reason why a criticism is not privileged, will go far towards justifying the foregoing characterization of Cockburn's judicial services. His conceptions on this particular topic were cleared by the Court of Appeal in the subsequent case of Merivale *v.* Carson ;[4] and his opinions may be searched in vain for such a technical and concise but comprehensive statement of the law of libel as that made by Lord Blackburn in Capital & Counties Bank *v.* Henty.[5]

To the law in its larger relations he made some important contributions. One of the most valuable of these is his exhaustive examination of the status of martial law in his charge to the grand jury before whom it was sought to indict Colonel Nelson and Lieutenant Brand for their participation in the court martial by whose authority, during the insurrection in Jamaica in 1865, a civilian had been executed.[6] In Reg. *v.* Keyn,[7] he delivered his

[1] 4 F. & F. 983.

[2] The tenor of this charge is that a public writer on matters of public importance is protected if, in writing honestly and with reasonable moderation, he makes, through mistaken inferences on matters of fact involved, defamatory statements the truth of which he cannot substantiate.

[3] Some of his many decisions in actions for libel are Reg. *v.* Calthorpe, 27 J. P. 581; Seymour *v.* Butterworth, 3 F. & F. 372; Morison *v.* Belcher, 3 F. & F. 614; Cox *v.* Feeney, 4 F. & F. 13; Reg. *v.* Labouchere, 14 Cox Cr. Cas. 419; Parkes *v.* Prescott, 4 Ex. 169; Spill *v.* Maule, 4 Ex. 232; Seaman *v.* Nethercliff, 2 C. P. D. 53.

[4] 20 Q. B. D. 275.

[5] 7 A. C. 741.

[6] In his examination of the power of the sovereign, by virtue of the prerogative of the crown, in the event of rebellion, to establish and exercise martial law within the realm of England, he cleared for all time some current notions of martial law. Of late, he said, doctrines of the most startling character had been put forward — "doctrines which, if true, would establish the position that British subjects, not ordinarily subject to military or martial law, may be brought before tribunals armed with the most arbitrary and despotic power — tribunals which are to create the law they have to administer, and to determine upon the guilt or innocence of persons brought before them, with a total disregard of all those rules and principles which are of the very essence of justice, and without which there is no security for innocence. . . . And I say that before such doctrines — doctrines so repugnant to the genius of our people, to

[7] 2 Ex. D. 63.

most elaborate opinion. The "Franconia," a foreign ship on a voyage to a foreign port, while passing within three miles of the shore of England, ran into and sank a British ship, whereby a passenger was drowned; and the question at issue was whether the Central Criminal Court, which exercised the jurisdiction formerly possessed by the admiral, had jurisdiction to try the captain of the "Franconia" for manslaughter.[1] In Phillips *v.* Eyre,[2] another

the spirit of our laws and institutions, to all we have been accustomed to revere and hold sacred — are countenanced and upheld in an English court of justice, we ought to see that there is sufficient authority for the assertion that British subjects can be thus treated. For it must not be forgotten that whatever may be the charge upon which a man may be accused, though he may be a rebel, though he may be the worst traitor that ever was brought to the block, he is still a subject, and entitled, when brought to justice, to those safeguards which are of the essence of justice, which have been found by experience to be necessary to prevent the rash conclusions and hasty judgments which even men experienced in the administration of justice are at times liable to form — to prevent, what sometimes happens, innocence from being confounded with guilt on appearances which a more patient and thorough investigation would have placed in a different light — safeguards more especially required in times of excitement and passion, when the minds of men are more apt to be led astray. . . . I cannot but think that the abuse of martial law is one of the main causes through which it has acquired the character for lawlessness and irresponsible power which has been ascribed to it in modern times. But it is said that as the necessity of suppressing rebellion is what justifies the exercise of martial law, and as, to this end, the example of immediate punishment is essential, the exhibition of martial law in its most summary and terrible form is indispensable. If by this it is meant that examples are to be made without taking the necessary means to discriminate between guilt and innocence, and that in order to inspire terror, men are to be sacrificed whose guilt remains uncertain, I can only say I trust no court of justice will entertain so fearful and odious a doctrine. There are considerations more important even than the shortening the temporary duration of an insurrection. Among them are the eternal and immutable principles of justice, principles which never can be violated without lasting detriment to the true interests and well being of a civilized community."

[1] His conclusion in this case is a characteristic expression of conservatism. "In the result," he said, "looking to the fact that all pretension to sovereignty or jurisdiction over foreign ships in the narrow seas has long since been abandoned — to the uncertainty which attaches to the doctrine of the publicists as to the degree of sovereignty and jurisdiction which may be exercised on the so-called territorial sea — to the fact that the right of absolute sovereignty therein and of penal jurisdiction over the subjects of other states has never been expressly asserted or conceded among independent nations, or in practice exercised or acquiesced in, except for violation of neutrality or breach of revenue or fishery laws, which, as has been pointed out, stand upon a different footing — as well as to the fact that neither in legislating with reference to shipping, nor in respect of the criminal law, has Parliament thought proper to assume territorial sovereignty over the three mile zone, so as to enact that all offences committed upon it by foreigners in foreign ships should be within the criminal law of the country, but, on the contrary, wherever it was thought right to make the foreigner amenable to our law has done so by express and specific legislation — I cannot think that, in the absence of all precedent and of any judicial decision or authority applicable to the present purpose, we should be justified in holding an offence committed under such circumstances to be punishable by the law of England."

[2] 4 Q. B. 225.

case arising out of the Jamaica insurrection, he held in an able opinion that where the right of action in respect of an act otherwise wrongful is taken away, before an action has been brought in England, by a law binding where such act was committed, no action can be maintained in England.[1] On his opinion as one of of the judges of the Geneva Arbitration it would be unprofitable to dwell. His zealous advocacy of English interests excited admiration in England and criticism in this country and elsewhere. Cockburn's view of his position was that he sat "not as a judge, but as in some sense the representative of Great Britain," and the elaborate opinion made public by him after the dissolution of the tribunal is marred by the defects which characterize his most unfortunate controversial efforts.[2]

To the discharge of his duties as Lord Chief Justice of England Sir Alexander Cockburn brought the high code of honor which characterized his career at the bar; and all those qualities which give confidence to the profession and to the public at large — manly courage and independence, honest love of justice and true regard for the public welfare — are indelibly associated with his name. Certain defects of private character may have detracted from his personal influence, but the modest expectation of pro-

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[1] Among his valuable contributions to the criminal law are Reg. *v.* Hicklin, 3 Q. B. 360, as to the bearing of motive in criminal acts; Reg. *v.* Charlesworth, 9 Cox Cr. Cas. 45, and Reg. *v.* Winsor, 10 Cox Cr. Cas. 308, as to whether in criminal cases a mistrial is a bar; Reg. *v.* Rowton, 10 Cox Cr. Cas. 28, on the testimony admissible to prove good character; Reg. *v.* Carden, 14 Cox Cr. Cas. 363, as to whether mandamus will lie to compel a magistrate to receive evidence.

The following commercial cases will repay examination: Sacramanga *v.* Stamp, 5 C. P. D. 295, as to whether ship owners are liable for the loss of a cargo in a deviation for the purpose of saving life; Nugent *v.* Smith, 1 C. P. D. 423, on the liability of carriers by sea; Twycross *v.* Grant, 26 P. D. 469, a case of fraudulent prospectus; Rouquette *v.* Overman, 10 Q. B. 524, as to the bearing of the *lex loci* of performance on bills of exchange; Bates *v.* Hewitt, 2 Q. B. 595, upon the obligation to disclose material facts in contracts of insurance. It may be pointed out, in this connection, that the significance of Cockburn's important opinion in Goodwin *v.* Robarts, mentioned in a former note, lies in its reputation of Blackburn's conservative view of trade customs as expressed in Crouch *v.* Credit Foncier, 8 Q. B. 376.

See, also, his elaborate discussion of the nature and effect of foreign judgments in Castrique *v.* Imrie, 30 L. J. C. P. 177; and the celebrated ecclesiastical controversy, Martin *v.* Mackonochie, 3 Q. B. D. 730; 4 Q. B. D. 697; 6 App. Cas. 424, in which the writ of prohibition issued by Cockburn was set aside on appeal.

[2] In cold print he calls statements of the eminent counsel for the United States "strange misrepresentations," and "assertions without the shadow of a foundation." He says "their imaginations must have been lively whilst their consciences slept;" and he finds a portion of their argument "the worst confusion of ideas, misrepresentation of fact, and ignorance, both of law and history, which were perhaps ever crowded into the same space."

fessional fame which he once expressed has been more than realized:

"I can only hope that as the result of two and twenty years of judicial life, an ever-present and honest love of justice, assiduous industry, patience in the investigation of truth, and a fearless discharge of what I deem to be my public duty, have in some degree made up for my deficiencies, and have enabled me, while immeasurably inferior to the great men who have gone before me, to discharge the duties of my office in a manner not altogether unsatisfactory to or undeserving the confidence of the profession and the public."[1]

Van Vechten Veeder.

COLORADO SPRINGS, COL.

[1] Letter to Lord Penzance.